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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 318.

J. HENRIETTA HOFFELD, EXECUTRIX OF RUDOLPH HOFFELD, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 11, 1901.

(18,151.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1901.

1 In the United States Court of Claims.

J. HENRIETTA HOFFELD, Executrix of the Estate of Rudolph Hoffeld, Deceased, Claimant,
vs.
THE UNITED STATES, Defendant.
} No. 21872.

I.—*Petition. Filed June* 5, 1900.

The petition of J. Henrietta Hoffeld, executrix of the estate of Rudolph Hoffeld, deceased, respectfully represents:

1. That she is a citizen of the United States, residing in the town of Lancaster, Erie county, State of New York; that she has always yielded true allegiance to the Government of the United States of America, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; that in her as executrix as aforesaid is vested the title to the claim hereinafter sued on, neither she nor her testator, the said Rudolph Hoffeld, deceased, ever having sold or assigned the same, or any part thereof, to any person or persons.

2. That said Rudolph Hoffeld, in his lifetime, was the owner of all the rights originally acquired by Harry Jones, J. L. Cole, Charles L. Weaver and Samy Perri to coal entry number 13, Ute series, at Gunnison, Colorado. That William L. Hinds, the attorney-in-fact of said entrymen, paid to the United States thirty-two hundred ($3,200.00) dollars purchase-money for one hundred and sixty (160) acres of coal lands described as follows: The northeast quarter (N. E. ¼) of section thirty-five (35), in township fourteen (14) south, of range eighty-seven (87) west, sixth (6th) P. M., Colorado.

2 Petitioner further states that the said purchase was made under coal entry 13, Ute series, May 28, 1886, in the names of Harry Jones, J. L. Cole, Charles L. Weaver and Samy Perri, applicants therefor, and that said applicants or entrymen on May 29, 1886, by William L. Hinds, their attorney-in-fact, conveyed the above-described land to the Ohio Creek Anthracite Coal Company, for a recited consideration in the deed of thirty-two hundred ($3,200.00) dollars, and by virtue of a judgment against the said Ohio Creek Anthracite Coal Company, a sheriff's deed was, on November 10, 1887, made to Rudolph Hoffeld, a purchaser at an execution sale under said judgment. Said Rudolph Hoffeld has since deceased, he having duly appointed J. Henrietta Hoffeld, the petitioner, as his executrix by his last will and testament, and the surrogate court of the county of Erie, State of New York, granted to her letters testamentary of the said last will and testament.

Petitioner further states that long after the payment of the said money the Commissioner of the General Land Office affirmed that an error was committed in the allowance of the said entry upon the affidavit of William L. Hinds, under a power of attorney, in the absence of Harry Jones, J. L. Cole, Charles L. Weaver and Samy Perri to act for and in the names of said Jones, Cole, Weaver and

Perri and exacted an affidavit of said Jones, Cole, Weaver and Perri claimed to be required by section 32 of the coal-land regulations.

Petitioner further states that of the said Jones, Cole, Weaver and Perri two had departed this life and the other two could not be found at the time of said exaction, and hence it was impossible to comply with the requirement of the Commissioner of the General Land Office.

Petitioner further states that the entire transaction from beginning to end was above board and known in all its parts to the register and receiver of the land office where the entry was made, and that the money was received for the United States with a knowledge of all the facts and without any concealment or subterfuge whatever on the part of any of the parties in interest, and that whatever errors were made in the allowance of the purchase of the said coal land were errors for which the officers of the land office were solely responsible.

Petitioner further states that the purchase of the said coal land was canceled by the Commissioner of the General Land Office on January 27, 1895, about eight years and eight months after
3 it was made, and more than seven years after said Rudolph Hoffeld purchased said land, for alleged errors committed in the allowance of the purchase to be made on the papers presented.

Petitioner further states that by the cancellation of the said purchase, Rudolph Hoffeld, in his lifetime, and J. Henrietta Hoffeld, as executrix of his estate, have been deprived of the entire consideration for which the said thirty-two hundred ($3,200.00) dollars purchase-money was paid to the United States, and petitioner further states that the act of June 16, 1880, is a contract on the part of the United States to repay to petitioner the said purchase-money, and that application for repayment under said act, of the said purchase-money, was made to the Commissioner of the General Land Office, and that said Commissioner on November 4, 1897, denied such repayment, from which an appeal was taken to the Secretary of the Interior, who rejected said application on December 11th, 1899.

Wherefore petitioner prays judgment of this court against the United States in the sum of thirty-two hundred ($3,200.00) dollars.

J. HENRIETTA HOFFELD,
Ex'r'x, Claimant.

ANDREWS & ANDREWS,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

W. Robert Andrews being first duly sworn deposes and says that he is a member of the firm of Andrews & Andrews, who are attorneys for the claimant named in the foregoing petition, and that he believes the facts stated in such petition are true and that there is due the claimant from the United States the sum of thirty-two hun-

dred ($3,200.00) dollars over and above all offsets thereto against the claimant on the part of the United States.

W. ROBERT ANDREWS.

Subscribed and sworn to before me this 5th day of June, A. D. 1900.

[SEAL.] GEO. E. TERRY,
Notary Public, D. C.

4 II.—*Traverse. Filed December* 10, 1900.

J. HENRIETTA HOFFELD, Executrix of Rudolph Hoffeld,
vs.
UNITED STATES. } No. 21872.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

5 III.—*Findings of Fact and Conclusion of Law.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

On May 28, 1886, there was entered by Harry Jones, J. L. Cole, Charles L. Weaver, and Samy Perri, through William Hinds, acting in their behalf under a power of attorney, the N. E. ¼ section 35, township 14 S., range 87 W., of the sixth principal meridian, as coal entry No. 13, at Gunnison, Colo., the sum of $3,200 being paid therefor.

II.

The affidavit required by section 32 of the coal-land regulations was not made by the several entrymen, but by the said William Hinds as attorney-in-fact. This affidavit was held to be insufficient by the General Land Office on April 12, 1888, and the local land officers were directed to notify the claimants to that effect. No report having been received from the local officers of their action under said instructions, such report was called for by the General Land Office on August 11, 1894. On August 27, 1894, the local officers reported that two of the entrymen were reported dead; that Perri and Cole were no longer residents of Colorado; that their whereabouts could not be ascertained; that none of the entrymen had any interest in said tract of land at that time; that the representatives of the present owners, W. L. Youle, stated that the evidence required could not be furnished; that no coal in paying quantities existed on said tract, and that the owners are indifferent as to whether said entry is canceled or not. Whereupon the entry was held for cancellation by the General Land Office on October 4,

1894. Neither the entrymen nor their assigns took any action in the premises, and accordingly the entry was canceled by the General Land Office on January 24, 1895.

The affidavit required by section 32 of the coal-land regulations is to the effect that each entryman made the entry for his own advantage and benefit, and not, directly or indirectly, for the use and benefit of any other person or persons.

III.

On May 29, 1886, the entrymen of said tract of land, to wit, Harry Jones, J. L. Cole, Charles L. Weaver, and Samy Perri, by their
6 said attorney-in-fact, W. L. Hinds, conveyed the aforesaid tract of land to the Ohio Creek Anthracite Coal Company. On August 29, 1887, a writ of attachment was issued out of the county court of Gunnison county, Colo., in a suit wherein Asenath L. Hinds was plaintiff and The Ohio Creek Anthracite Coal Company was defendant, and levied upon the aforesaid tract of land, as well as other land belonging to the said company. On August 23, 1887, a like writ of attachment was issued out of the district court of Arapahoe county, Colo., in a suit wherein The Hendric and Bolthoff Manufacturing Company were plaintiffs and The Ohio Creek Anthracite Coal Company was defendant, and levied upon the aforesaid tract of land, as well as other land belonging to the defendant company. On November 10, 1887, the aforesaid tract of land "and other property" was sold by the sheriff of Arapahoe county, Colo., to Rudolph Hoffeld, at and for the recited consideration of $75, on account of the aforesaid writ of attachment, in the suit wherein The Hendric and Bolthoff Manufacturing Company were plaintiffs and The Ohio Creek Anthracite Coal Company was defendant.

Subsequently the land in question was sold by the county treasurer of Gunnison county, Colo., to W. T. Lambert, for the non-payment of taxes thereon; and subsequently, to wit, on March 5, 1896, by order of the county commissioners of Gunnison county, the county treasurer was "authorized to remit and cancel the assessment and levy of all taxes now due and unpaid to the county," because the title and ownership to said land was still in the United States of America.

IV.

On June 10, 1897, William L. Youle, as attorney-in-fact for Rudolph Hoffeld, made application for repayment of the purchase-money paid on said land under the provisions of the act of June 16, 1880, which was denied on November 4, 1897, and again on appeal to the Secretary of the Interior on December 11, 1899, for the reason that said application did not come within the provisions of the said act of June 16, 1880.

V.

That W. L. Youle made an affidavit reciting that the duplicate receipt issued by F. J. Leonard, receiver of the United States land

office in Gunnison, Colorado, dated May 28, 1866 in the name of Harry Jones, J. L. Cole, Charles W. Weaver and Samy Perri for the sum of three thousand two hundred dollars ($3,200) purchase-money for the N. E. quarter of section 35, town 14, S., R. 87 W., Gunnison, Colorado, and for which certificate No. 13 Ute series was issued was destroyed by fire June 17, 1890; that said affidavit was made on December 23, 1898, and is now on file in the General Land Office.

VI.

Rudolph Hoffeld, on February 24, 1896, executed and delivered a quitclaim deed to the United States for the N. E. quarter of section 35 town 14 S., R. 87 W., county of Gunnison, State of Colorado. Said deed is on file in the General Land Office, as appears by certified copy now on file in this court.

Conclusion of Law.

The court decides as a conclusion of law upon the foregoing facts that the claimant has no right to recover, and the petition is therefore dismissed.

BY THE COURT.

7 IV.—*Opinion of the Court.*

WELDON, J., delivered the opinion of the court:

The plaintiff, as executrix of Rudolph Hoffeld, brings this suit to recover the sum of $3,200, which was paid to the United States in the entry of certain land in Gunnison county, Colo., on the 28th of May, 1886.

The findings of fact show, that on that date Harry Jones, J. L. Cole, Charles L. Weaver, and Samy Perri, through William Hinds, acting in their behalf under power of attorney, made entry of said land. The affidavit required by section 32 of the coal-land regulations was not made by the several entrymen, but by Hinds as attorney-in-fact. The affidavit was held to be insufficient by the officers of the General Land Office, on April 12, 1888, and the local land officers were directed to notify the claimants to that effect. On August 27, 1894, the local officers reported that two of the entrymen were dead; that Perri and Cole were no longer residents of Colorado; that their whereabouts could not be ascertained; that none of said entrymen had any interest in said land; that the representatives of the present owners, W. L. Youle, stated that the evidence required could not be furnished; that no coal in paying quantities existed on said tract, and that the owners are indifferent as to whether said entry is canceled or not. Neither the entrymen nor their assigns took any action in the premises, and accordingly the entry was canceled by the General Land Office on January 24, 1895. On May 29, 1886, said entrymen, by their said attorney-in-fact, had conveyed the land to the Ohio Creek Anthracite Coal Com-

pany. On August 29, 1887, a writ of attachment was issued out of the county court of Gunnison county, Colo., in a suit, wherein Asenath L. Hinds was plaintiff and said company was defendant, and levied upon the aforesaid tract of land as well as other land belonging to said company. On August 23, 1887, a like writ of attachment was issued out of the district court of Arapahoe county, Colo., in a suit wherein The Hendric and Bolthoff Manufacturing Company were plaintiffs and The Ohio Creek Anthracite Coal Company was defendant, and levied upon said tract of land as well as upon other land belonging to said company. On November 10, 1887, the aforesaid tract of land and other property was sold by the sheriff of Arapahoe county to Rudolph Hoffeld for the sum of $75, under the said writ of attachment, in the suit wherein The Hendric and Bolthoff Manufacturing Company was plaintiff and The Ohio Creek Anthracite Coal Company was defendant. On June 10, 1897, William L. Youle, as attorney-*of*-fact for Rudolph Hoffeld, made application for repayment of the purchase-money paid on said land, under the provisions of the act of June 16, 1880, which was denied on November 4, 1897, and again on appeal to the Secretary of the Interior on December 11, 1899, for the reason that the said application did not come within the provision of said act of June 16, 1880.

The theory upon which the suit is predicated is, that the administrator of Hoffeld, whose decedent purchased at sheriff's sale on November 10, 1887, is entitled to the benefit of the statute of June 16, 1880 (21 Stat. L., 287); and to recover the amount paid by the original entrymen through their attorney-in-fact this suit was brought.

The statute, section 2, provides that "where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, the amount of purchase-money and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office."

In the view which the court has taken of the rights of the claimants, it is not necessary to discuss the question as to whether the entry was properly made or whether it was improperly canceled.

8 It is sufficient for the purposes of this case to examine and determine the question as to whether there are such relations between the claimant, as representative of the decedent, and the entrymen, as will entitle the claimant to the benefit of the statute. The statute provides that in case of conflict, or where from any cause the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions and the amount of purchase-money. The right to reimbursement by the terms of the statute is confined to the person

who made the entry, his heirs or assigns, and it does not inure to, and is not made applicable to any other person. Whatever may be the rights of the original entrymen, can it be said that the purchaser at a judicial sale is in such privity of contract or statutory obligation as entitles him to recover on failure of title because of the cancellation of the entry?

The doctrine of *caveat emptor* applies in all its force to a judicial sale, and the purchaser at such a sale buys the title or estate which the defendants in execution may have without the rights and benefits of covenants of warranty which inure to the ordinary purchaser. (15 Ill., 395; 25 Ala., 626; 2 Ohio N. S., 36.)

The claim of the plaintiff must be determined and measured by the statute which authorizes the refunding of the money. The claim is purely of statutory obligation without any of the elements of a contract or covenant and must be brought clearly within the terms of the statute before any recovery can be had.

A very serious question might arise as to whether the parties or their assigns to the entry could have such a standing in court as to entitle them to a remedy under the act of June, 1880; but it is not necessary to discuss and determine their right of redress, as the plaintiff cannot rely on their legal or equitable right of recovery. The plaintiff's rights are measured by the purchase at the judicial sale, and those rights being limited by the law which governs judicial sales of realty, no liability attaches to the defendant predicated upon an alleged right in entrymen or their assigns. The petition is therefore dismissed.

V.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 21st day of January 1901, judgment in the above-entitled cause was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order adjudge and decree that the petition of the claimant J. Henrietta Hoffeld executrix of Rudolph Hoffeld deceased, be dismissed.

BY THE COURT.

9 VI.—*Motion of Claimant for New Trial.* *Filed Feb'y* 11, 1901.

J. HENRIETTA HOFFELD. Executrix of the Estate of Rudolph Hoffeld, Deceased, Claimant,
vs.
THE UNITED STATES. } No. 21872.

Now comes the claimant, by Andrews & Andrews, her attorneys, and moves the court to grant her a new trial in the above-entitled cause, which was decided in favor of the defendant on January 21, 1901, and as grounds therefor assigns the following errors:

1. In holding that Rudolph Hoffeld, because he purchased the land for which repayment is claimed at a judicial sale, is not an as-

signee of the entrymen within the purview of section 2 of the act of June 16, 1880, relating to the repayment of certain fees, purchase-money and commissions paid on void entries (21 Stats., 287).

2. In not holding that the claimant was entitled to recover under the second section of said act of June 16, 1880.

3. In not rendering judgment for the claimant for the sum of three thousand two hundred dollars.

Respectfully submitted.

ANDREWS AND ANDREWS,
Att'ys for Claimant.

10 VII.—*Opinion of the Court Overruling Claimant's Motion for New Trial, April* 8, 1901.

WELDON, J., delivered the opinion of the court:

It is insisted by counsel for the claimant, that the court erred in holding that such claimant is not entitled to the benefit and right provided by the second section of the act of June 16, 1880 (21 Stat. L., 287), which provides, in substance, that in case an entry of land is for any reason canceled, that the entryman, his heirs or assigns, upon certain conditions, are entitled to a repayment of the purchase-money.

It is insisted that the entryman has a complete title to the land; that he has a right to sell it before patent, and that the purchaser at a judicial sale under an execution against the entryman is a party entitled to repayment under the provisions of said act, providing that assigns may apply therefor, and that the statute clearly gives the right of repayment to such a purchaser.

The motion presents the question whether the term "his heirs or assigns," within the meaning and purview of the act, means his voluntary assigns or does it also include purchasers who are not his assigns, but transferees of the land by operation of law—that is, by virtue of the Colorado statute which authorizes land conveyed by an entry to be sold under judgment and execution.

In the decision of the case the court construed the phrase "his heirs and assigns" according to its primary natural meaning to be his own—his voluntary—assigns.

It is only by the extension of the phrase so as to include the transferees of the land by operation of law, that the claimant's theory of the statute can be sustained.

A grant or an assignment primarily implies a grantor or an assignor, and not the mere transfer of title by operation of law.

The second section of the act provides as follows: "Upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land," etc. Does not this clause clearly indicate that Congress did not intend to extend the meaning of "his assigns" so as to include a purchaser at an involuntary, forced, or judicial sale? Such purchasers would not have the "duplicate receipt" to surrender to the Government. And such surrender is, by the act, made as essential as the relinquishment of all claims to the land.

The person who made the entry, his heirs or assigns, voluntarily assigning, whether immediate or mediate, would presumably
11 have the duplicate receipt, but the purchaser at the forced sale would presumably not have it. This prerequisite makes it very evident that purchasers at judicial sale are not his assigns of the land within the purview of the act.

The question is asked would not a purchaser under a quitclaim deed be entitled to recover under this act? It may be conceded that he would; a quitclaim deed is a voluntary transfer. It is said "the purchaser at a sheriff's sale acquires all the right, title, and interest of the judgment debtor." This is granted so far as the land is concerned. But it by no means follows that a purchaser acquires a privilege which is granted to the debtor and "his heirs or assigns."

The doctrine of *caveat emptor*, as we have said in the original opinion, applies to judicial sales. The purchaser at such sale gets the only title or estate in the land which the debtor may have. He does not get a privilege which is given only to the debtor, his heirs or assigns, or his grantee or assigns.

The phrase "his heirs or assigns" was evidently used in the act as including only such persons as would have in their possession the duplicate receipt to surrender. The language of the act limits the privilege to such transferees of the lands as are his transferees holding the duplicate receipt and prepared to surrender it.

There is no authority to import into the act the phrase "transferees by operation of law," transferees without and against his consent, or any other words to construe the force and effect of the requirement for the surrender of the duplicate receipt. This clause requiring the surrender of the duplicate receipt cannot be ignored. It makes this case analogous to Doe *v.* Bevant (3 M. and S., 353) and Breading *v.* Boggs (20 Penn. Stat., 33).

It is not necessary to pass upon the rights of any person but the claimant. Under the act of 1880 a privilege is granted by the defendants, and no one is entitled to claim the entry money unless upon a due consideration of all the provisions of the statute, ignoring no one of them, it appears from a correct construction that the claimant comes within the purview of the provisions of the law.

It is possible that for a mere pittance the purchaser at a forced judicial sale might succeed in getting possession of the duplicate receipt, but this possibility cannot affect the construction of the act. The question will always be, Did the claimant really acquire his title or claim to the land by a voluntary sale of the land? Did the decedent purchase a right as against the United States, or simply the land, with whatever title the judgment creditor had in the title to the land?

Suppose the entryman had, on the day before the rendition of the judgment or the sale under the execution, sold and transferred to a third person, conveying to such person all right and title to the land, and the deed had not been placed on record on the day of the sale, and the judgment creditor had neither constructive nor actual notice of such sale or transfer, can it be said that as against the in-

nocent purchaser from the entryman the purchaser at the sale would take, under the act, as against such purchaser from the original entryman?

Even though in a proper case under the general jurisdiction of the court an action for money had and received may be maintained, it is incumbent upon the plaintiff to show that he is entitled to recover by the performance of all the conditions annexed and incident to the subject-matter of his claim. If the liability of the Government depends upon a condition precedent with reference to the subject-matter of the claim, the plaintiff must allege and prove the performance of and compliance with such condition before he is entitled to recover. The statute in this case having annexed a condition to the right of the claimant to recover, he must show performance of that condition, as his remedy is predicated upon and his right to recover is determined by the terms of the law.

For the reasons above stated the motion for a new trial is overruled.

12 VI.—*Application for and Allowance of Appeal.*

J. HENRIETTA HOFFELD, Executrix of the Estate of Rudolph Hoffeld, Deceased, Claimant,
vs.
THE UNITED STATES, Defendant. } No. 21872.

Now comes the claimant, by Andrews & Andrews, her attorneys, and prays the court for allowance of an appeal from the judgment entered herein on the 21st day of January, 1901, in favor of the defendant, to the Supreme Court of the United States, and as grounds therefor assigns the following errors:

1. In holding that, because the claimant's testator purchased the land, on account of which repayment is claimed, at a judicial sale, he was not an assign of the entrymen, within the purview of section 2 of the act of June 16, 1880, relating to the repayment of certain purchase-money, fees and commissions paid on void entries, (21 Stats., 287).

2. In not holding that the claimant was entitled to recover under section 2 of said act of June 16, 1880.

13 3. In finding as a fact that "neither the entrymen nor their assigns took any action in the premises, and accordingly the entry was canceled by the General Land Office on January 24, 1895," when said finding of fact is entirely immaterial and irrelevant.

4. In not rendering judgment for the claimant in the sum of three thousand, two hundred dollars.

ANDREWS & ANDREWS,
Attorneys for Claimant.

Filed April 15, 1901.

At a Court of Claims held in the city of Washington it was ordered that the foregoing application for appeal be allowed as prayed for.

BY THE COURT.

April 15, 1901.

14 In the Court of Claims.

J. HENRIETTA HOFFELD, Executrix of Rudolph Hoffeld, Deceased,
vs.
THE UNITED STATES. } No. 21872.

I John Randolph assistant clerk of the Court of Claims hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 11th day of May, A. D. 1901

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18,151. Court of Claims. Term No. 318. J. Henrietta Hoffeld, executrix of Rudolph Hoffeld, deceased, appellant, *vs.* The United States. Filed May 11th, 1901.